Supreme Court, U.S.
FILED

(1)

No. 95-1947 FEB 2 - 1996

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

SYLVIA ROSENBERG, Individually and as Administratrix of the Goods of Sidney Rosenberg, Deceased,

Petitioner,

vs.

SOL WACHTLER, Individually, STEWART F. HANCOCK, JR., Individually, JUDITH S. KAYE, Individually and in her official capacity as Chief Judge of the Court of Appeals of the State of New York, RICHARD D. SIMONS, VITO J. TITONE, JOSEPH W. BELLACOSA, GEORGE BUNDY SMITH, and HOWARD A. LEVINE, all Individually and in their official capacities as Associate Judges of the Court of Appeals of the State of New York, and DONALD M. SHERAW, Individually,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTORY STATEMENT

Petitioner's 42 U.S.C. §1983 action, brought against the judges of the highest court of the State of New York was dismissed under F.R.C.P.12(b)(1). The petitioner's complaint alleged that the respondents, as judges of a court of strictly limited subject matter jurisdiction, had clearly lacked all subject matter jurisdiction to reverse her unanimously affirmed $854,950.04 wrongful death judgment and dismiss her action against Equitable Life.

QUESTIONS PRESENTED

Was it proper to grant respondents' F.R.C.P. 12(b)(1) motion to dismiss?

Was it proper to grant the F.R.C.P. 12(b)(1) motion with prejudice?

Was it proper to grant the F.R.C.P. 12 (b)(1) motion despite respondents' failure to submit an affidavit in support?

Was it proper to have denied plaintiff's informal request and subsequent motion to transfer the appeal to another circuit?

LIST OF PARTIES

The caption contains the names of all parties who appeared before the Court of Appeals for the Second Circuit.

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OPINIONS BELOW

The unreported decision of the United States Court of Appeals for the Second Circuit was issued on November 6, 1995, and is reproduced in the Appendix at A-1. The Lexis report thereof is reproduced in the Appendix at A-4. The bench decision of the United States District Court for the Northern District of New York, as transcribed by the court reporter, was rendered on April 10, 1995, and appears in the Appendix at A-5. This latter decision was incorporated into a written order dated April 18, 1995, which appears in the Appendix at A-12. The judgment was entered on April 27, 1995 (App. at A-14).

JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit was issued and filed on November 6, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law[.]

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any

> State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This case was brought pursuant to 42 U.S.C. § 1983, and was filed in the United States District Court for the Northern District of New York on December 15, 1994.

Count I of the complaint alleges that defendants Sol Wachtler, Judith S. Kaye, Richard D. Simons, Vito J. Titone, Stewart F. Hancock, and Joseph W. Bellacosa, all judges of the Court of Appeals of New York, violated Mrs. Rosenberg's right to due process and equal protection of the laws when, in the clear absence of all subject-matter jurisdiction, they unlawfully reversed and dismissed her unanimously affirmed wrongful death judgment against The Equitable Life Assurance Society of the United States (Equitable) for the wrongful death of her husband, Sidney Rosenberg.

Count II alleges that defendant Donald M. Sheraw, Clerk of the Court of Appeals of the State of New York, unlawfully deprived Mrs. Rosenberg of her constitutional rights by wrongfully and deliberately refusing to perform the nondiscretionary act of dismissing Equitable's appeal to the New York Court of Appeals, pursuant to N.Y. Ct. App. R. 500.9(b), when Equitable twice failed to timely perfect its appeal.

Count III alleges that defendants Kaye, Hancock, Simons, Titone, Bellacosa, George Bundy Smith, and Howard A. Levine violated Mrs. Rosenberg's constitutional rights, and thereby left her without a remedy under New York law, when, as judges of the Court of Appeals, they unlawfully converted her motion to vacate their prior ruling for lack of subject-matter jurisdiction, brought under N.Y. Civ. Prac. L.&R. § 5015, which is the New York counterpart of Fed. R. Civ. P. 60(B)(4), into a motion to reargue, which they then denied for having been untimely made.

The complaint is reproduced in full begining at page A-19 of the appendix, herein. (App. A-19 thru A-36).

Prior to filing an answer to the complaint, the respondents moved to dismiss pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, arguing that the federal district court lacked subject-matter jurisdiction under the Rooker-Feldman doctrine, that the defendants were immune from suit under the doctrine of absolute judicial immunity, and that Mrs. Rosenberg had no protectable property interest in the jury verdict.

The district court dismissed Mrs. Rosenberg's complaint pursuant to Rule 12(b)(1) on April 10, 1995, ruling that it did not have subject-matter jurisdiction. Ignoring its obligation under Scheuer v. Rhodes, 416 U.S. 232 (1974), to construe the well pleaded allegations of the complaint favorably to the plaintiff, the court found that the judges of the Court of Appeals had considered their jurisdiction, had implicitly found that they had subject matter jurisdiction, and that finding was conclusive and binding on the district court.

> It is clear that this Court cannot review for error the Court of Appeals determinaions that it had subject matter jurisdiction. . . .
>
> ....[i]t is powerless to review the jurisdictional determinations made by the Court of Appeals.

In light of this wrongful construction of the law, the district court concluded that the Rooker-Feldman doctrine barred it from hearing Mrs. Rosenberg's § 1983 action:

Mrs. Rosenberg appealed to the United States Court of Appeals for the Second Circuit, which on November 6, 1995, summarily upheld the ruling of the district court "for substantially the same reasons stated in Judge McAvoy's oral decision rendered in the presence of counsel for the parties on April 10, 1995" (App. at A-2).

BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The Federal District Court had original jurisdiction of this 42 U.S.C. § 1983 action under, 28 U.S.C. §§ 1331, 1343, 1651(a), and the Constitution of the United States.

REASONS FOR GRANTING THE WRIT

Congress provided a federal remedy for the violation of petitioner's constitutional rights by the respondents. The lower federal courts have wrongfully changed the facts of the case and misapplied the law so as to deny the petitioner her lawful right to pursue her statutory remedy. Supervision by this Court is requested.

By dismissing Mrs. Rosenberg's action pursuant to Rule 12(b)(1) for lack of subject-matter jurisdiction, the district court essentially ruled that the judges of the Court of Appeals of New York are exempt from the application of 42 U.S.C. § 1983, even when they deprive a citizen of his or her constitutional rights through actions taken in the clear absence of all subject matter jurisdiction. In wrongfully applying the Rooker-Feldman doctrine to bar review of the action of the judges of the Court of Appeals of New York in this case, the courts below have given the judges of that court free reign to violate the constitutional rights of New York litigants with impunity. This result is obviously in contravention of this Court's settled rulings that state court judges, including judges of a state's highest court, are proper defendants in a § 1983 action.

I

When Congress enacted Section 1 of the Civil Rights Act of 1871, now codified at 42 U.S.C. § 1983, it clearly intended the statute to protect against violations of constitutional rights by judges of state courts. As stated in Mitchell v. Foster, 407 U.S. 225, 240-42 (1972):

> It is clear from the legislative debates surrounding passage of § 1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment "against State action, . . . whether that action be executive, legislative, or judicial." Ex parte Virginia, 100 U.S. 339, 346, 25 L.Ed. 676 (emphasis supplied). Proponents of the legislation noted that state courts were being used to harass and injure individuals, either because the state courts were powerless to stop

> deprivations or were in league with those who were bent upon abrogation of federally protected rights.

This Court thus held in Mitchell that a federal district court hearing a § 1983 action erred in concluding that it was precluded from issuing an injunction to halt a state court proceeding which was violative of the plaintiff's First Amendment rights.

The restrictions of the Fourteenth Amendment, which are enforced by § 1983, are directed to all kinds of state actions, including judicial actions. As this Court stated in Ex parte Virginia, 100 U.S. 339, 346-47 (1880):

> We have said the prohibitions of the Fourteenth Amendment are addressed to the States. . . . They have reference to actions of the political body denominated by a State, by whatever instruments or in whatever modes that action may be taken. A state acts by its legislative, its executive, or its judicial authorities. It can act in no other way.

(Emphasis added.)

It is thus well established by this Court that state judicial officers, including judges of a state's highest court, may, in the absence of complete judicial immunity, properly be sued under § 1983 to remedy their violations of a citizen's constitutional rights under the Fourteenth Amendment. Pulliam v. Allen, 466 U.S. 522 (1984); Supreme Court of Virginia v. Consumers Union of United States, Inc., 446 U.S. 719 (1980).

In this case, therefore, the judges of the Court of Appeals of New York, by virtue of their action which unconstitutionally deprived Mrs. Rosenberg of her protected property interest in her judgment without due process or equal protection of the laws, were properly named as defendants in the this action. The district court was duty bound to exercise its subject-matter jurisdiction over this action.

II

The basis for the district court's granting of the Rule 12(b)(1) motion to dismiss was that the court was precluded from hearing the case by virtue of the Rooker-Feldman doctrine.

Under the Rooker-Feldman doctrine, a party losing in state court is barred from seeking in federal district court what in substance would be appellate review of the merits of the state court judgment, based on the losing party's claim the state court judgment incorrectly decides a federal issue and thus violates the losing party's federal rights. Johnson v. De Grandy, 114 S. Ct. 2647, 2654 (1994); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 416 (1923).

The Rooker-Feldman doctrine has as a predicate the existence of subject-matter jurisdiction. This case alleges however, that there was no subject-matter jurisdiction. The Rooker-Feldman doctrine cannot be held applicable where it is alleged that the decision was rendered in the clear absence of all subject matter jurisdiction, and the act of rendering the decision was itself a violation of constitutional rights protected by § 1983. There is nothing in this Court's prior rulings to support the conclusion that this Court intended such a result.

In other words, the basis of the petitioner's § 1983 suit was not that the state court ruling was incorrect, but that the judges of said state court had no statutory or constitutional authority to make their ruling, and that by ruling without authority, outside of their strictly limited subject-matter jurisdiction, the respondents violated Mrs. Rosenberg's constitutionally protected rights.

It is apparent that if the district court's view of the Rooker-Feldman doctrine were to be adopted by this Court, or by other lower courts, unconstitutional actions by the judges of a state's highest court would invariably be beyond the reach of § 1983. The district court's wrongful application of the Rooker-Feldman doctrine essentially insulates the judges of a state's highest court from any § 1983 action brought in federal court based on their unconstitutional actions. Such a result is clearly unacceptable in light of the clear remedy, provided by Congress in § 1983, for the protection of citizens from the unconstitutional actions by judges of state courts.

The affirmed ruling of the district court below simply failed to recognize the crucial distinction between its lack of authority to review the correctness of the decision of the Court of Appeals of New York as to the merits of Mrs. Rosenberg's wrongful death action, and its authority under § 1983 to consider whether the New York judges violated Mrs. Rosenberg's constitutional rights by issuing a ruling on matters on which they had no subject-matter jurisdiction to act.

Mrs. Rosenberg was entitled to prove her case under the law in the federal district court. The district court had a statutory obligation to hear and decide the issues raised in Mrs. Rosenberg's § 1983 complaint on the merits, and not to dismiss it on "jurisdictional" grounds.

Review of this case by the Court would clarify that the wrongful invocation of the Rooker-Feldman doctrine cannot be used to bar review under § 1983 of the actions of the judges of a state's highest court, where they act without jurisdiction and thus deprive a citizen of a constitutionally protected right.

III

Yet another reason for granting the Petition for Writ of Certiorari in this case is the fact that the lower court rulings conflict with this Court's ruling in Bell v. Wood, 327 U.S. 678, (1946), and Scheuer v. Rhodes, supra, and the federal cases which have construed them. In Bell, this Court concluded that where a plaintiff files an action in federal court which the defendant claims does not state a federal cause of action, the court must entertain the suit and decide the issue on the merits, rather than dismissing for lack of subject-matter jurisdiction. In other words, "[j]urisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action[.]" 327 U.S. at 682; see also Land v. Dollar, 330 U.S. 731 (1947) (if disputed jurisdictional facts are inextricably intertwined with the merits of the case, the court should defer its jurisdictional decision until the merits are heard).

On the basis of Bell, the courts of appeals have recognized that where a defendant's challenge to the court's jurisdiction is also a challenge to the existence of a federal cause of action, the proper procedure is to find that the jurisdiction exists and to deal with the objection as a direct attack on the merits of the plaintiff's case. E.g., Herbert v. National Academy of Sciences, 974 F.2d 192 (D.C. Cir. 1992); Spencer v. Casavilla, 903 F.2d 171 (2d Cir. 1990); Daniel v. Ferguson, 839 F.2d 1124 (5th Cir. 1988); Daigle v. Opelousas Health Care, Inc., 774 F.2d 1344 (5th Cir. 1985).

By its ruling in this case, the district court failed to recognize this controlling principle and thus erroneously dismissed the action under Rule 12(b)(1). Review by this Court is necessary to clarify that the principle of Bell continues to be viable.

In evaluating whether subject matter jurisdiction existed on respondents' motion to dismiss pursuant to F.R.C.P. 12(b)(1), the district court was required to construe the well pleaded allegations of petitioner's complaint favorably to her as the pleader as per Scheuer. In appraising the sufficiency of the complaint, the district court had to follow the accepted rule that a complaint should not be dismissed unless it appeared beyond doubt that the petitioner could prove no set of facts which would entitle her to relief. Id., citing, Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), and Gardner v. Toilet Goods Assn., 387 U.S. 167, 172 (1967).

The district court deviated from the Scheuer rules also by making a factual determination, contrary to the allegations in the complaint, that the New York Court of Appeals judges did not act in the clear absence of all subject matter jurisdiction, and that the Clerk acted properly.

The district court also improperly deviated from its own local rules in evaluating plaintiff's complaint for purposes of the motion to dismiss. The defendants' 12(b)(1) motion was procedurally defective because it failed to include an affidavit in support as required by Local Rule 7.1c of the district court. Failure to comply with Local Rule 7.1 should have been fatal to the motion under the court rules.

The law is settled that all courts, including the federal district court, must follow their own lawful procedural rules.

As this Court stated in Windsor v. McVeigh, 93 U.S. 274, 182-83 (1876)[emphasis added]:

> All courts, even the highest, are more or less limited in their jurisdiction...**Though the court may possess jurisdiction of a cause, of the subject matter, and of the parties, it is still limited in its modes of procedure,** and in the extent and character of its judgments. It must act judicially in all things, and cannot transcend the power conferred by the law...**So a departure from established modes of procedure will often render the judgment void...And the reason is, that the courts are not authorized to exert their power in that way.**

The District Court had subject matter jurisdiction to hear and determine plaintiff's § 1983 action with its required explicit and implicit collateral jurisdictional attack on the illegal decision and order of the New York Court of Appeals. It erred in stating that it was being asked to review a state court decision for error and that plaintiff was merely attempting to circumvent this obstacle "by couching her claim of constitutional error in terms of a civil rights statute". (App. A-8) The District Court's decision and order improperly carved out a blanket exception from § 1983 liability for the judges and clerk of a state's highest court even though there is nothing in the language of the statute or its legislative history that supports such an exemption.

The District Court clearly erred in dismissing the plaintiff's Complaint under 12(b)(1).

IV

Although unnecessary to the disposition of the case under Rule 12(b)(1), the district court stated that it believed that the doctrine of absolute judicial immunity would bar the relief sought by Mrs. Rosenberg. It must be noted that the district court's observations regarding the application of absolute judicial immunity are plainly at odds with this Court's rulings regarding the scope of judicial immunity.

It is clear from this Court's decisions that judges of a state's highest court can be sued under § 1983. Pulliam v. Allen, supra; Supreme Court of Virginia v. Consumers Union of United States, Inc., supra. The defendants are not exempt from liability under § 1983 for their judicial acts committed in the clear absence of all subject matter jurisdiction. See, e.g., Bradley v. Fisher, 80 U.S. 335, 20 L.Ed. 646 (1871); Randall v. Brigham, 74 U.S. 523, 19 L.Ed. 285 (1868). Moreover, it is well established that judicial immunity protects only against actions for damages, and not for injunctive or prospective relief. Mireles v. Waco, 112 S. Ct. 286, 287 n.1 (1991); Pulliam v. Allen, supra.

The § 1983 complaint filed by Mrs. Rosenberg alternatively sought the reinstatement of the judgment which she had been awarded by the jury and affirmed unanimously by the Appellate Division, First Department.

There can be no question that the district court erred in ignoring this, and broadly stating that judicial immunity formed an absolute bar to Mrs. Rosenberg's action.

The Second Circuit affirmance of the district court is also in conflict with its own decision in Maestri v. Jutkofsky, 860 F.2d 50 (2d Cir. 1988), cert. denied, 489 U.S. 1016 (1989)

and it involves an important federal question which conflicts with prior relevant decisions of this Court.

This case presents facs which show that the defendant s were acting in the clear absence of all subject-matter jurisdiction. This Court has held that, judges are entitled to absolute judicial immunity when they act within their subject matter jurisdiction. Stump v. Sparkman, 435 U.S. 349 (1978); Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871). The corollary to this is that when judges act in the clear absence of all subject matter jurisdiction, they are subject to suit under 42 U.S.C. § 1983 for the deprivation of a citizen's constitutional rights.

The District Court ruled that the defendants can conclusively determine their own subject matter jurisdiction. This is irreconcilably inconsistent with the U.S. Supreme Court rulings on the "clear absence of all subject matter jurisdiction" exception to judicial immunity. See, Randall v. Bringham and Bradley v. Fisher, supra.

A dismissal under F.R.C.P. 12(b)(1) is not on the merits therefore the district court erred in dismissing petitioners case with prejudice.

V

Per the papers reproduced at pages A-15 thru A-18 of the Appendix, petitioner questions whether the Second Circuit should have granted her request to transfer this case to another circuit.

The Second Circuit did not address petitioner's F.R.A.P. 28(j) submission on October 25, 1995, of an article from page 3 of the New York Law Journal dated October 12,

1995 entitled "New York Court of Appeals Roundup". It discusses Chief Judge Judith Kaye's speech wherein she claims to have more power as a common law state judge than a federal judge has. As a common law judge she is quoted as saying that she is free to "read a statute contrary to its apparent plain meaning", and that federal judges are precluded from doing this.

The article also quotes a speech delivered by Judge Richard Simons, the author of the Court of Appeals decision which is the subject of this litigation:

> Judge Simons' lecture was strongly critical, however, of Justice Scalia's opinion in *U.S. v. Dixon* and Chief Justice Rehnquist's opinion in *Payne v. Tennessee*. These decisions overruled recent precedent based on the reasoning of dissents in earlier cases and, according to Judge Simons, leave the reader persuaded that "power, not reason, has dictated changes in the law." These decisions do not "develop a continuing story, they abruptly kill off characters in the plot."

These public statements reveal the judicial philosophy which resulted in the respondents' violation of petitioner's constitutional rights, and underscores the need for this Court to grant this writ.

CONCLUSION

For all of the foregoing reasons, the petitioner, Sylvia Rosenberg, requests the Court to grant this Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, and to accept this case for review.

Respectfully submitted,

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Attorney for the Petitioner

APPENDIX

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED
NOV 6 1995

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94-cv-1623
McAvoy
Mag. Smith

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City and County of New York, on the **11th** day of **Nov.** one thousand nine hundred and ninety-five.

Present: HONORABLE JOSEPH M. McLAUGHLIN,
HONORABLE PIERRE N. LEVAL,
Circuit Judges,

HONORABLE JOHN E. SPRIZZO,*
District Judge.

SYLVIA ROSENBERG, Individually and as Administratrix of the Goods of Sidney Rosenberg, Deceased,

Plaintiff-Appellant,

- v.- No. 95-7451

SOL WACHTLER, Individually; STEWART F. HANCOCK, JR., Individually; JUDITH S. KAYE, Individually and in her official capacity as Chief Judge of the Court of Appeals of the State of New York; RICHARD D. SIMONS, VITO J.

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*Of the United States District Court for the Southern District of New York, sitting by designation.

TITONE, JOSEPH W. BELLACOSA, GEORGE BUNDY SMITH, and HOWARD A. LEVINE, all Individually and in their official capacities as Associate Judges of the Court of Appeals of the State of New York, DONALD M. SHERAW, Individually.

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of New York (McAvoy, J.).

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York and was argued.

ON CONSIDERATION WHEREOF, it is hereby ordered, adjudged, and decreed that the judgment of the district court be and it hereby is AFFIRMED.

Sylvia Rosenberg appeals from a decision dismissing this action with prejudice for lack of subject matter jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(1).

We affirm for substantially the same reasons stated in Judge McAvoy's oral decision rendered in the presence of counsel for the parties on April 10, 1995, and incorporated into the order dated April 18, 1995 and filed April 19, 1995.

We have fully considered the other claims advanced on this appeal and find them to be without merit.

The decision of the district court is AFFIRMED.

J.M. McLaughlin /s
HON. JOSEPH M. McLAUGHLIN,

Pierre N. Leval /s
HON. PIERRE N. LEVAL,

Circuit Judges.

John E. Sprizzo /s
HON. JOHN E. SPRIZZO,

District Judge.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN THE UNRELATED CASES BEFORE THIS OR ANY OTHER COURT

1ST CASE of Level 1 printd in FULL format.

Rosenberg v. Wachtler

95-7451

UNITED STATES

COURT OF APPEALS FOR THE SECOND CIRCUIT

1995 U.S. App. LEXIS 37263

November 6, 1995, Decided

PRIOR HISTORY: United States District Court for the Northern District of New York. 94-cv-1523.

OPINION: Affirmed

NOTICE: [*1] RULES OF THE SECOND CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SYLVIA ROSENBERG, individually and as Administratrix of SIDNEY ROSENBERG,

Plaintiff,

- against -

194-CV-1623
(BENCH DECISION)

SOL WACHTLER, individually, et al.,

Defendants.

STENOGRAPHIC MINUTES of the TRANSCRIPT OF PROCEEDINGS held in and for the United States District Court, Northern District of New York, at the James T. Foley United States Courthouse, 445 Broadway, Albany, New York 12201-1037, on Monday, April 10, 1995, before the HON. THOMAS J. McAVOY, CHIEF JUDGE.

A.S.E. REPORTING SERVICE (518) 458-1091

A P P E A R A N C E S:

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Assistant Attorney General
Appearing for Defendants

THE COURT: Now, as the court indicated a moment ago, defendants here move for dismissal under 12(b)(1) for lack of subject matter jurisdiction and under 12(b)(6) for failure to state a claim upon which relief can be granted.

For purposes of both motions the court will apply the same standard to plaintiff's complaint; the court should not dismiss unless it is clear that the plaintiff can in no way establish a set of facts sustaining her claim which will permit relief and which would allow the court to assert its jurisdiction. Hughes v. Rowe, 449 U.S. 5, at Page 10; Bass v. Jackson, 790 F.2d 260, at Page 262. Furthermore, the court considers only plaintiff's complaint and in determining the legal sufficiency of the complaint's allegations, all plaintiff's well-pleaded allegations will be taken as true and her alleged facts will be viewed in the light most favorable to her. Scheuer v. Rhodes, 416 U.S. 232, at 236. Finally, since the court will consider only the allegations contained in the complaint, in light of the applicable legal principles statutory and otherwise, the absence of an affidavit in support of defendant's motion will not preclude the court's consideration thereof. Compare Northern District of New York Local Rule of Practice 7.1(c)(1).

Now, plaintiff has alleged that by their actions in reversing a jury verdict and judgment in her favor, two separate panels of the New York State Court of Appeals and the Clerk of that Court have violated 42 U.S.C. Section 1983 by denying her due process rights under color of State law. At its core plaintiff's alleged due process violation flows from her

allegations that the Court of Appeals lacked subject matter jurisdiction to consider the appeal in question.

Looking only at plaintiff's complaint it is clear that this court lacks the subject matter jurisdiction to entertain plaintiff's complaint; to proceed otherwise would inextricably require this court to review prior decisions of the Court of Appeals of the State of New York for error. Under the Rooker-Feldman doctrine, review of the decisions of state courts of competent jurisdiction is simply beyond the power of the United States District Courts. See Rooker v. Fidelity Trust Company, 263 U.S. 413, at Pages 415 and 416; District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, at 476.

Now, the plaintiff attempts to circumvent the Rooker-Feldman doctrine by her repeated assertions that the Court of Appeals itself lacked subject matter jurisdiction to render its decision. This argument fails for a number of reasons. First and foremost, in paragraph 50 of her own complaint plaintiff alleges that "by order dated May 9, 1991, the Court of Appeals granted Equitable leave to appeal, over plaintiff's opposition on jurisdictional grounds, 77 N.Y.2d 810." At paragraphs 53 and 54 plaintiff alleges that "On June 24, 1991 plaintiff moved the Court to dismiss Equitable's appeal for lack of subject matter jurisdiction. On September 17, 1991 the Court denied plaintiff's motion to dismiss without opinion, 78 N.Y. 2d 995." As plaintiff's own allegatios [sic] make clear beyond peradventure, the Court of Appeals considered its jurisdictional basis, including plaintiff's arguments in opposition to the Court's exercise of jurisdiction, and conclusively determined that it had subject matter jurisdiction. Whether one conceptualizes this Court's inability to review that determination as flowing from principles of res judicata, see Durfee v. Duke, 375 U.S. 106, or application of

Rooker-Feldman principles, it is clear that this court cannot review for error the Court of Appeals determinations that it had subject matter jurisdiction.

Nor can plaintiff obtain relief by couching her claim of constitutional error in terms of a civil rights statute. See Fariello v. Campbell, 860 F.Supp. 54 at 66. That's an Eastern District of New York case. Plaintiff's remedy, even for constitutional error, if any, in the Court of Appeals jurisdictional determinations, can be sought only in the United States Supreme Court. See Texaco v. Pennzoil Company, 784 F.2d 1133, at 1142, reversed on other grounds, 481 U.S. 1; See also, Rogers-Fink v. Cortland County Department of Social Services, 855 F. Supp. 45, at 46.

Plaintiff points to dicta in various cases to assert the proposition that this court must treat as a nullity a decision from a state court rendered in "the complete absence" of subject matter jurisdiction. A review of the cases, however, shows that decisions rendered in "the complete absence" of jurisdiction are a rare species indeed. Even those cases whose dicta plaintiff purports to rely on inevitably hold that the Rooker-Feldman principles preclude review of the decisions at issue. See Thistlethwaite v. City of New York, 362 F. Supp. 88, at 91; Tang v. Appellate Division of New York Supreme Court, First Department, 487 F.2d 138, at 142 and 143, cert. denied, 416 U.S. 906.

Furthermore, even if this court could undertake review of the Court of Appeals jurisdictional basis, a cursory examination of the complaint and the relevant statutes belies plaintiff's conclusory allegations that the Court acted "in the clear absence of jurisdiction." In fact under the New York Civil Practice Law and Rules, the Court of Appeals did have

jurisdiction to consider Equitable's appeal in this matter which, according to the plaintiff's own allegations, originated in a New York State Supreme Court and was affirmed in a final order from the Appelate [sic] Division. See N.Y.C.P.L.R. Section 5602; see also Stump v. Sparkman, 435 U.S. 349, at 356. Plaintiff's arguments to the contrary that Equitable allegedly failed to preserve their objections and that the Court had improperly reversed findings of fact as opposed to questions of law are arguments properly made on appeal from the decision plaintiff complains of. At best such allegations might establish only that the Court acted in excess of its jurisdiction. Even if true such allegations could not establish the "clear absence" of jurisdiction. See Stump at 357, note 7. In short, while plaintiff argues that she does not seek review of the merits of the appeal, this court finds both that it is powerless to review the jurisdictional determinations made by the Court of Appeals, and that all of plaintiff's "complete absence of jurisdiction" arguments inextricably lead back to a review of the merits.

Finally, and with particular reference to defendant Sheraw, the court notes the failure of plaintiff's allegations that because Equitable missed certain filing deadlines connected to the appeal, Sheraw and the Court of Appeals acted unconstitutionally. Even if the court were not forestalled from further inquiry as outlined above, careful review of Title 22, Part 500 of the New York Code of Rules and Regulations reveals that Sheraw possesses a statutory grant of discretion to alter these procedural filing deadlines. See NYCRR Section 500.9(b) which states that prior to the expiration of a twenty-day notice of failure to perfect, the Clerk of the Court has the power to grant extensions; See also, Section 500.4(g) which states that post-termination of sua sponte review, the clerk sets a new schedule. Since Sheraw

was exercising a discretionary judgment in his performance of a judicial function, and in light of this court's finding that plaintiff's own allegations belie her conclusion that the Court suffered from a clear absence of jurisdiction, it follows that even if this court could entertain plaintiff's complaint against Sheraw, like the rest of the defendants, would partake of absolute immunity. See Antoine v. Byers and Anderson, 113 S.Ct. 2167, at 2171; and Stump at 356.

The absolute immunity analysis is unnecessary however, in light of the court's conclusion that any review of plaintiff's claims, including review of her allegations of the complete absence of subject matter jurisdiction, would be "inextricably intertwined" with review of the judgment of the New York State Court of Appeals and so this court lacks subject matter jurisdiction to entertain plaintiff's complaint. Accordingly, despite the court's sympathy with plaintiff's frustration at the negative resolution of a long and protracted litigation, plaintiff's complaint must be dismissed pursuant to 12(b)(1) as a matter of law.

So if you want to submit an order.

Thank you.

MS. RONEY: All right. Thank you, Your Honor.

MR. GRUBEL: Thank you.

(Whereupon, the proceedings in the above-entitled matter were concluded, this date.)

CERTIFICATION

I, BONNIE J. BUCKLEY, a Shorthand Reporter and Notary Public in and for the State of New York, hereby certify that the transcript to which this certificate is annexed is a true and accurate record of the minutes of the proceedings herein, to the best of my knowledge and belief.

Bonnie J. Buckley 4/14/95 /s
BONNIE J. BUCKLEY

U.S. DISTRICT COURT
N.D. OF N.Y.
ORIGINAL FILED

APR 19 1995

GEORGE A. RAY, Clerk
BINGHAMTON

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SYLVIA ROSENBERG, Individually and as Administratrix of the Goods of SIDNEY ROSENBERG, Deceased,

Plaintiff,

ORDER

Civil Action

No.

-against-

94-CV-1623

(TJM) (RWS)

SOL WACHTLER, Individually, STEWART F. HANCOCK JR., Individually, JUDITH S. KAYE, Individually, and in her official capacity as Chief Judge of the Court of Appeals of the State of New York; RICHARD D. SIMONS, VITO J. TITONE, JOSEPH W. BELLACOSA, GEORGE BUNDY SMITH, and HOWARD A. LEVINE, all individually and in their official capacities as Associate Judges of the State of New York; DONALD M. SHERAW, individually,

Defendants.

APPEARANCES:

HENRY M. GRUBEL, ESQ.
Attorney for the Plaintiff
37 Prospect St.
P.O. Box 628
Freeport, NY 11520

DENNIS C. VACCO
Attorney General of the
State of New York
Bar Roll No. 601093
Attorney for Defendants
The Capitol
Albany, NY 12224

DEIRDRE RONEY
Assistant
Attorney
General
of Counsel

Defendants having moved for dismissal of this action pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure on the grounds that this Court lacks subject matter jurisdiction over this action and that the complaint fails to state a claim upon which relief may be granted;

and this Court having considered the parties' submissions and having determined, in an oral decision rendered in the presence of counsel for the parties on April 10, 1995, and incorporated into and considered a part of this order, that it lacks subject matter jurisdiction over this action, it is hereby

ORDERED, that this action is dismissed with prejudice.

DATED: Binghamton, New York
April 18, 1995

Thomas J. McAvoy /s
THOMAS J. MCAVOY
CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SYLVIA ROSENBERG,
plaintiff

JUDGMENT IN A CIVIL CASE

V.

SOL WACHTLER, ET AL,
defendant

CASE NUMBER: 1:94-cv-1623

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

that this action is dismissed with prejudice,

all in accordance with Chief Judge McAvoy's order dated April 18, 1995.

April 27, 1995 *George A. Roy /s*
Date Clerk

A. Buchman /s
(By) Deputy Clerk

LETTERHEAD OF HENRY M. GRUBEL, P.C.

July 7, 1995

Steven Flanders, Circuit Executive
United States Court of Appeals, Second Circuit
United States Courthouse - Room 1803
Foley Square, New York 10007

RE: Rosenberg v. Wachtler 95-7451

Dear Mr. Flanders:

At the June 15, 1995 telephone pre-argument conference, Staff Counsel Frank Scardilli told me, one on one, that the appeal herein would go nowhere; that the case is impossible on appeal; that Judge McAvoy has a bullet to my brain and another to my heart regarding the jurisdictional and immunity issues of the case; that the appeal might be a candidate for sanctions; that the Court will consider this to be a frivolous appeal and that I may be taught a painful lesson for bringing the appeal. All very threatening.

Mr. Scardilli emphasized his 18 years of experience with the Court, and I take him at his word. The foregoing plus other things he said tells me that this Court has already decided to affirm the errors of fact and law committed by Judge McAvoy, and find in the defendants' favor.

In view of the foregoing the appellant per-force waives the confidentiality of the CAMP and respectfully requests that this appeal be transferred to another Circuit more removed from the defendants herein.

Respectfully, HENRY M. GRUBEL /s

cc: Dennis C. Vacco, Esq. Attn: Denise A. Hartman,Esq.

THE SECOND JUDICIAL CIRCUIT
OF THE UNITED STATES

STEVEN FLANDERS
CIRCUIT EXECUTIVE
212-791-0982

2904 United States Courthouse
Foley Square
New York, N.Y. 10007

July 13, 1995

Henry M. Grubel, P.C.
37 Prospect Street
Freeport, N.Y. 11520

Dear Mr. Grubel:

I respond to your communication dated July 7, in which you inform me of certain events in a telephone preargument conference with Staff Counsel Frank Scardilli.

I can only express regret at your dismay at the conference in which you participated, including what you characterize as its "threatening" qualities. I note, however, that Mr. Scardilli's work is completely independent of the judges of this court, as the Civil Appeals Management Plan and its Guidelines make clear. You are entirely free to ignore the views he expressed, and to press your appeal fully if you wish. I remind you further that the conferences in this program are confidential, and the judges of the Second Circuit Court of Appeals neither know nor care what Mr. Scardilli thinks of the merits of your appeal.

Any request for a transfer of you appeal to another circuit must be made by motion. I am not aware of any promising basis on which such a motion might be made under the circumstances you describe.

Sincerely, Steven Flanders /s

SF:lw

cc: Dennis C. Vacco, Esq. Attn: Denise A. Hartman, Esq.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

95-7451
NOTICE OF MOTION
For CHANGE OF VENUE

ROSENBERG v. WACHTLER

MATERIALS LEFT BLANK

IT IS HEREBY ORDERED that the motion be and it hereby

is ~~granted~~ denied

FOR THE COURT,

RICHARD ALCANTARA /s
By: Richard Alcantara
Calendar Clerk

November 2nd 1995

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED NOV 2 1995
GEORGE LANGE III, CLERK

Previous requests for similar relief and disposition:

By letter dated July 7, 1995 to Steven Flanders, the Circuit Executive, plaintiff requested transfer of this appeal to another Circuit for reasons other than those set forth herein. Mr. Flanders denied the request by letter dated July 13, 1995. Defendant's counsel was copied on the exchange of letters.

Statement of the issue(s) presented by this motion:

Is there an appearance of impropriety for this Court to hear this appeal when a defendant herein, Chief Judge Judith Kaye, was on the nominating commissions for judges of this Court.

Brief statement of the facts ***(with page references to the moving papers)*****:**

See Exhibit A attached to plaintiff's affidavit wherein the biography of Chief Judge Kaye contained in the New York Red Book states that the defendant Chief Judge Judith Kaye was a member of President Jimmy Carter's Nominating Commissions for Judges of the United States Court of Appeals for the Second Circuit in 1979 and 1980. In 1983 she also was a member of the Merit Selection Panel for United States Magistrates for the Southern District of New York.

Summary of the argument ***(with page references to the moving papers)*****:**

In view of the defendant Chief Judge Judith Kaye's membership on the aforementioned judicial selection Commissions, which may well have directly impacted Judges in this Circuit or on this Court, this Court should, in the interests of justice, exercise its discretion and grant plaintiff's request for a change of venue so as to avoid any appearance of impropriety.

U.S. DISTRICT COURT
N.D.OF N.Y.
ORIGINAL FILED
DEC 15 1994
GEORGE A. RAY, Clerk
ALBANY

COMPLAINT
JURY TRIAL DEMANDED
94-CV-1623
TJM RWS

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

----------x

SYLVIA ROSENBERG, Individually and as Administratrix of the Goods of SIDNEY ROSENBERG, Deceased,

Plaintiff,

-against-

SOL WACHTLER, individually; STEWART F. HANCOCK, JR., Individually; JUDITH S. KAYE, individually, and in her official capacity as Chief Judge of the Court of Appeals of the State of New York; RICHARD D. SIMONS, VITO J. TITONE, JOSEPH W. BELLACOSA, GEORGE BUNDY SMITH, and HOWARD A. LEVINE, all individually and in their official capacities as Associate Judges of the Court of Appeals of the State of New York; DONALD M. SHERAW, individually,

Defendants.

----------x

Plaintiff, for her complaint states as follows:

PRELIMINARY STATEMENT

1. This is a civil action seeking compensatory damages or in the alternative, mandatory declaratory/ injunctive relief, plus punitive damages to redress the wrongful deprivation by the defendants under color of New York State law, of the plaintiff's property in her $854,950.04 judgment against The Equitable Life Assurance Society of the United States ("Equitable"), for the wrongful death of her husband Sidney Rosenberg.

2. It is alleged that the defendants clearly lacked all subject matter jurisdiction to reverse the Appellate Division's order, which had affirmed plaintiff's judgment in full, and to dismiss plaintiff's complaint.

3. By their actions the defendants deprived the plaintiff of the property of her judgment by violating her federally protected constitutional rights, privileges and immunities, including plaintiff's federally guaranteed rights under the Fourteenth Amendment to the Constitution of the United States to due process and equal protection of the law.

JURISDICTION

4. This action is brought pursuant to 42 U.S.C. Section 1983 and the Fourteenth Amendment to the Constitution of the United States. This Court has jurisdiction of this action under 28 U.S.C. Sections 1331, 1343, 1651(a), and the aforesaid statutory and constitutional provisions.

PARTIES

5. Plaintiff Sylvia Rosenberg, ("Mrs. Rosenberg" or "plaintiff"), at all times relevant hereto was and still is a citizen of the United States of America and a resident of the County of the Bronx, in the State of New York.

6. Prior to May 1977, Mrs. Rosenberg was appointed Administratrix of the Goods of her deceased husband Sidney Rosenberg, by the Surrogate of Bronx County.

7. On information and belief, at certain times relevant hereto, the defendants, Sol Wachtler ("Wachtler"), Richard D. Simons ("Simons"), Judith S. Kaye ("Kaye"), Vito J. Titone ("Titone"), Stewart F. Hancock ("Hancock"), Joseph W. Bellacosa ("Bellacosa"), George Bundy Smith ("Smith"), Howard A. Levine ("Levine"), and Donald M. Sheraw, ("Sheraw") were citizens of the United States, and residents of the State of New York.

8. At certain times relevant to this action Wachtler was, and Kaye is now, the Chief Judge of the Court of Appeals of the State of New York. (variously referred to herein as "the Court", the "Kaye Court", or the "Wachtler Court").

9. At certain times relevant to this action Kaye, Simons, Titone, Hancock, Bellacosa, Smith, and Levine were duly appointed Associate Judges of New York's Court of Appeals.

10. At all times relevant to this action, Sheraw was the Clerk of the Court of Appeals of the State of New York.

FACTUAL ALLEGATIONS REGARDING PLAINTIFF'S UNDERLYING ACTION AGAINST EQUITABLE

11. On April 6, 1976, plaintiff's 51 year old overweight and diabetic husband, with a history of myocardial infarction, became ill while undergoing a "Master's Two-Step" exercise electrocardiogram (EKG). He died as a consequence thereof thirty days later.

12. The fatal exercise EKG was done at Equitable's direction by its examining physician, Dr. Rajendra Arora, a general practitioner, in connection with Mr. Rosenberg's insurance physical for a $30,000.00 life insurance policy.

13. In May 1977, plaintiff brought suit in the Supreme Court, State of New York, Bronx County, Index No.17267/77, against Equitable, its agent Roger Malhotra, and Dr. Arora.

14. The plaintiff's complaint alleged three causes of action against Equitable: 1) one in contract for failure to pay the proceeds of the nonissued life insurance policy; 2) Equitable's liability for its own acts of negligence in causing Mr. Rosenberg's death; and 3) Equitable's failure to get an informed consent from Mr. Rosenberg.

15. Equitable denied in its answer and at trial that the exercise EKG had been performed.

16. Equitable refused to demand a bill of particulars.

17. Equitable did not assert any cross-claims or third-party claims against its examining physician, Dr. Arora.

18. Equitable did not plead culpable conduct, contributory negligence, assumption of risk, or any other affirmative defense in its answer, nor did it assert or prove any at trial.

19. The action was dismissed as to Dr. Arora by motion on jurisdictional grounds in 1981, due to his New Jersey situs. Dr. Arora's New Jersey presence precluded plaintiff from being able to subpoena him to testify at trial. Equitable did not produce Dr. Arora as a witness at either trial.

20. Equitable did not move to dismiss the complaint for failure to state a cause of action, or for summary judgment as a matter of law prior to trial.

21. There were two full trials of this action.

22. The first trial took place in or about August 1987, Hon. Justice Harold Tompkins, presiding.

23. Justice Tompkins dismissed the action as against Malhotra, as well as plaintiff's contract action for the policy proceeds.

24. Justice Tompkins granted plaintiff's motion to amend her pleadings to conform to the proof.

25. The jury returned a verdict in plaintiff's favor against Equitable for $400,000.00 for Mr. Rosenberg's wrongful death and $30,000.00 for his conscious pain and suffering.

26. Justice Tompkins denied Equitable's written post trial motion pursuant to CPLR 4404 in its entirety.

27. On January 27, 1988, judgment in the amount of $791,169.52 was entered by the plaintiff on her verdict.

28. Equitable appealed to the Appellate Division, First Department, requesting dismissal of plaintiff's action, or in the alternative a new trial on evidentiary grounds.

29. In a decision and order dated March 14, 1989, the Appellate Division reversed and vacated plaintiff's

judgment against Equitable and ordered a new trial. (148 A.D.2d 337).

30. The sole ground for reversal by the Appellate Division was the wrongful admission at trial of certain prejudicial hearsay testimony on a "linchpin" issue of fact of whether or not an exercise EKG had in fact been performed.

31. Equitable did not appeal to the Court of Appeals of the State of New York, the Appellate Division's denial of its request for dismissal of plaintiff's action.

32. The second trial took place in or about May 1989, Hon. Justice Barry Salman presiding.

33. At trial, Equitable's own physician experts testified that it was contraindicated and a departure from the accepted standard of insurance company practice and medicine for Equitable to have ordered that the exercise EKG be done, and that an informed consent should have been obtained.

34. Equitable had a precise written protocol that it mandated physicians to comply with when conducting the Master's Two-Step exercise EKG for it. The protocol made no mention of obtaining an informed consent from the insurance applicant.

35. In its CPLR 4401 motion at the close of the evidence at trial Equitable did not move for a directed verdict as a matter of law, to dismiss any of plaintiff's causes of action in negligence, informed consent, and vicarious liability, (which last cause of action came in at trial pursuant to the evidence that was adduced on this issue).

36. The sole basis of Equitable's CPLR 4401 motion was the sufficiency of the evidence on the fact issue of whether an exercise EKG had been performed.

37. The jury was charged by Justice Salman on each one of plaintiff's three causes of action or theories of liability.

38. Equitable took no exception to the trial court's charge to the jury regarding Equitable's own acts of negligence as being a proximate cause of Sidney Rosenberg's death.

39. Such exceptions as Equitable took to the informed consent and vicarious liability jury charges were made after all the evidence on these issues had come into evidence at trial.

40. The interrogatory ***"Was it inherently dangerous to have performed an exercise EKG on the date in question on the decedent?"*** went to the jury without exception or objection by Equitable. The unanimous jury response was ***"yes"***.

41. The interrogatory ***"Did defendant have a duty to inform decedent of the consequences of such an exercise EKG?"*** went to the jury without exception or objection by Equitable. The unanimous jury response was ***"yes"***.

42. The jury found in plaintiff's favor on each of plaintiff's causes of action and awarded her $400,000.00 for wrongful death, and $25,000.00 for pain and suffering.

43. The basis for Equitable's post-trial motion for a directed verdict per CPLR 4404 was the sufficiency of the evidence regarding whether the exercise EKG had been performed, and not as a matter of law on any cause of action.

44. Justice Salman denied the CPLR 4404 motion. On December 6, 1989 the plaintiff entered judgment on her verdict against Equitable for $854,950.04 in the Bronx County Clerk's office.

45. Equitable again appealed to the Appellate Division.

46. On appeal Equitable did not raise, argue, or brief as issues for review or appeal, the trial court's charge regarding Equitable's liability for its own acts of negligence.

47. In a decision and order dated January 22, 1991, the Appellate Division unanimously affirmed plaintiff's verdict against Equitable in its entirety. (169 A.D.2d 533).

48. The Appellate Division stated that with regard to having ordered a retrial in its prior March 14, 1989 decision, ***"...of course implicit in our decision was the conclusion that a prima facie case had been made out"***.

49. Equitable did not move the Appellate Division for leave to reargue or to appeal to New York's Court of Appeals.

50. By order dated May 9, 1991, the Court granted Equitable leave to appeal, over plaintiff's opposition on jurisdictional grounds, without opinion. (77 N.Y.2d 810).

51. Equitable's appeal was scheduled by the Court for full briefing and oral argument. It had to be perfected by July 8, 1991 or be dismissed per the Court's own rule, 500.9(a).

52. Equitable failed to timely perfect its appeal. The Clerk extended the date to September 20, 1991 at Equitable's request, which request was made after July 8, 1991.

53. On June 24, 1991 plaintiff moved the Court to dismiss Equitable's appeal for lack of subject matter jurisdiction.

54. On September 17, 1991 the Court denied plaintiff's motion to dismiss without opinion. (78 N.Y.2d 995).

55. By letter dated September 17, 1991, the parties were notified that the Court would handle Equitable's appeal by a "*sua sponte* examination of the merits", ("SSM"), rather than by full briefing and oral argument.

56. On December 18, 1991, about two months after both sides had made their SSM submissions, the Court reversed direction and ordered that Equitable's appeal would be heard by full briefing and oral argument.

57. A January 16, 1992 letter from Sheraw stated that Equitable's appellate brief and record on appeal had to actually be with the Court and plaintiff's counsel by February 16, 1992.

58. Plaintiff's counsel did not receive Equitable's brief and record on appeal until February 21, 1992.

59. All signatures on Equitable's original affidavit of service were rubber stamps, not actual written signatures.

60. On February 26, 1992, Sheraw denied plaintiff's requests for dismissal of Equitable's appeal for its failure to file its brief and record timely per Court's Rule 500.9(a).

61. Oral argument was held on May 5, 1992.

62. On June 11, 1992, the Court by the defendants Wachtler, Kaye, Simons, Titone, Hancock, and Bellacosa ("the Wachtler Court") issued a decision and order which reversed the Appellate Division's order, dismissed the plaintiff's complaint, and failed to address the issues raised by plaintiff regarding the Court's lack of subject matter jurisdiction. (79 N.Y.2d 663).

63. On October 18, 1993, the plaintiff moved pursuant to CPLR 5015(a)(3)&(4) to have the Court vacate

its June 11, 1992 decision and order for being void for the Court's clear lack of subject matter jurisdiction to have issued it.

64. In a decision dated November 18, 1993, the Court by Judges Kaye, Simons, Titone, Hancock, Bellacosa, Smith, and Levine, ("the Kaye Court") refused to consider plaintiff's CPLR 5015 motion to vacate on the merits. (82 N.Y.2d 825).

65. The Kaye Court converted plaintiff's CPLR 5015(a)(3) &(4) motion to vacate the Wachtler Court's June 11, 1992 decision for lack of subject matter jurisdiction to a motion to reargue, and thereby denied it as having been untimely made, to wit: more than thirty days after June 11, 1992.

COUNT I

AS TO THE DEFENDANTS WACHTLER, KAYE, SIMONS, TITONE, HANCOCK, AND BELLACOSA (THE WACHTLER COURT)

66. Plaintiff repeats and realleges the statements made in paragraphs 1 - ___ above with the same force and effect as if fully set forth herein.

67. The Court of Appeals of the State of New York is not a court of general jurisdiction.

68. The subject matter jurisdiction of the Court of Appeals of the State of New York, as applicable hereto, is strictly limited by the Constitution and Laws of the State of New York to the review of properly raised and preserved questions of law.

69. There were no questions of law in the underlying action that were properly preserved at trial that

gave the defendants subject matter jurisdiction to reverse the Appellate Division and dismiss plaintiff's complaint.

70. Equitable failed to raise or preserve any questions of law at trial, in the Appellate Division or in the Court itself, regarding plaintiff's duly pleaded, proven, charged, found, and affirmed cause of action in negligence.

71. Equitable's failure to take any exception to the trial court's jury charges regarding plaintiff's negligence cause of action, or to take any appeal therefrom, made such charge the conclusive law of the case, not subject to review, reversal or dismissal by the defendants.

72. On appeal Equitable specifically limited its request for dismissal of the complaint to certain aspects of only two, (informed consent and vicarious liability), of plaintiff's three causes of action.

73. These two issues were not properly preserved at trial as questions of law for review and reversal by the Court.

74. The defendants knew that dismissal of plaintiff's informed consent and vicarious liability causes of action would not have affected plaintiff's judgment, in that plaintiff's negligence cause of action, standing alone, supported her verdict and judgment in full.

75. In the second paragraph of their decision the defendants properly identified each one of plaintiff's three separate causes of action: negligence, informed consent, and vicarious liability.

76. The defendants went on to correctly state, that the jury found in plaintiff's favor on each cause of action, and that the Appellate Division had affirmed.

77. By the use of grammatical and arithmetic legerdemain however the defendants eliminated plaintiff's

separate negligence cause of action by subsuming it into plaintiff's cause of action for lack of informed consent, as follows:

> The plaintiff advances two theories for recovery. First, she contends that defendant is **vicariously liable** for the negligence of Dr. Arora although he was an independent contractor because the examination as administered was "inherently dangerous." Second, plaintiff asserts that defendant **is liable for its own negligence** in ordering the stress exam **and** in failing to obtain decedent's **informed consent** to it. The jury agreed with plaintiff on both grounds, awarding her a substantial verdict, and the Appellate Division affirmed. We conclude that defendant is not legally responsible to plaintiff on either ground and, therefore, reverse the judgment and dismiss the complaint. (emphasis supplied)

78. One plus one plus one equals three....not two.

79. Equitable's failure at trial to move for judgment as a matter of law pursuant to CPLR 4401, was a binding concession, which was conclusive on the Court, regarding the legal sufficiency of each one of plaintiff's three causes of action.

80. Equitable's failure to object or take exception to the submission of the jury interrogatories regarding informed consent and the inherent danger of the exercise EKG were binding concessions by Equitable that these issues involved no questions of law, only questions of fact, which when found by the jury and affirmed by the Appellate Division were conclusive on the Court.

81. Equitable's failure in its post trial motion pursuant to CPLR 4404, to request judgment as a matter of law, precluded the Court from then ruling on any alleged issues of law that Equitable subsequently raised in its appeal to the Court.

82. The Appellate Division's unanimous affirmance was a determination that the evidence at trial fully supported the jury's express findings that:

a) The exercise EKG was performed;

b) Performance of the EKG was inherently dangerous to plaintiff's decedent;

c) Equitable should have obtained the decedent's informed consent and;

d) The exercise EKG was a proximate cause of Sidney Rosenberg's death.

83. These affirmed findings of fact were conclusive on the Court. The defendants lacked subject matter jurisdiction to change them by characterizing them as questions of law.

84. The defendants acted without subject matter jurisdiction in ruling as if: Dr. Arora's negligence was an issue at trial; that there was a physician patient relationship between Mr. Rosenberg and Dr. Arora; and that Mr. Rosenberg was guilty of some assumption of risk or contributory negligence.

85. Equitable did not plead or prove any affirmative defenses, or any cross or third party claims against Dr. Arora.

86. The Wachtler Court clearly lacked all subject matter jurisdiction to grant Equitable immunity from tort

liability, when it ordered its physician to perform a contraindicated fatal exercise EKG, which had to be conducted according to Equitable's strict protocol.

87. Plaintiff addressed at length the Court's lack of subject matter jurisdiction in its appellate brief.

88. When the plaintiff challenged the Court's subject matter jurisdiction, Equitable, as the party asserting the Court's subject matter jurisdiction, had the burden of proving by a preponderance of the evidence that the Court had subject matter jurisdiction. Equitable failed to do so.

89. Equitable did not rebut plaintiff's allegations regarding the Court's lack of subject matter jurisdiction.

90. When Equitable twice failed to timely serve and file its brief, the defendants were required to follow their own rules and dismiss Equitable's appeal.

91. Equitable's failure to appeal to the Court the first Appellate Division decision, made the legal sufficiency of plaintiff's *prima facie* causes of action binding on the Court.

92. The Wachtler Court clearly lacked all subject matter jurisdiction to reverse the Appellate Division's order and dismiss the plaintiff's complaint. Accordingly, the June 11, 1992 decision is void and a nullity.

93. The Court's lack of subject matter jurisdiction could not be waived by the parties or by the defendants herein.

94. Any one of the issues raised in this Count I, standing alone, deprived the Wachtler Court of subject matter jurisdiction to reverse and dismiss plaintiff's complaint.

95. The defendants abused their powers as judges of the Court and violated their judicial oaths of office by

reversing the Appellate Division's order and dismissing plaintiff's complaint, in the clear absence of all subject matter jurisdiction to do so.

96. The wrongful and illegal conduct of the defendants as herein alleged, was undertaken by them under color of state law, statute, ordinance, regulation, custom, policy or usage.

97. The defendants' actions as alleged herein were undertaken knowingly, intentionally, deliberately, maliciously and with reckless or callous disregard of plaintiff's federally protected constitutional rights.

98. The defendants deprived the plaintiff of her $854,950.04 judgment in violation of plaintiff's federally guaranteed constitutional rights to due process and equal protection of the law under the Fourteenth amendment.

99. The defendants are liable to the plaintiff under Title 42, United States Code Sec. 1983 for the unlawful deprivation of plaintiff's civil rights.

COUNT II

AS TO THE DEFENDANT SHERAW

100. Plaintiff repeats and realleges the statements made in paragraphs 1 - ___ above with the same force and effect as if fully set forth herein.

101. Sheraw twice wrongfully and deliberately refused and failed to perform the nondiscretionary, administrative, and ministerial acts of dismissing Equitable's appeal pursuant to Court Rule 500.9(b), when Equitable twice failed to perfect its appeal timely.

102. The defendant clerk is liable to the plaintiff under Title 42, United States Code Sec. 1983 for the unlawful deprivation of plaintiff's civil rights.

COUNT III

AS TO THE DEFENDANTS KAYE, HANCOCK, SIMONS, TITONE, BELLACOSA, SMITH AND LEVINE (THE KAYE COURT)

103. Plaintiff repeats and realleges the statements made in paragraphs 1 - ___ above with the same force and effect as if fully set forth herein.

104. On October 18, 1993 the plaintiff pursued her sole remaining remedy under New York State law for vacating a judgment on jurisdictional grounds.

105. Plaintiff moved under the provisions of CPLR §5015(a) (3)&(4) to vacate the June 11, 1992 decision for lack of subject matter jurisdiction.

106. Plaintiff's counsel was directed by the motion clerk of the Court to bring the motion on by way of a notice of motion and not, as required by CPLR § 5015, by order to show cause.

107. There is no time limit for bringing a motion under CPLR §5015(a)(3)&(4) to vacate a decision or order for lack of subject matter jurisdiction.

108. Equitable's opposing papers failed to rebut the substantive issues raised in plaintiff's motion to vacate.

109. The defendants had no lawful power to exempt the Court and Equitable from the application of CPLR § 5015.

110. The defendants lacked the power to convert plaintiff's CPLR § 5015 motion to vacate the Wachtler Court's decision for lack of subject matter jurisdiction, to a motion to reargue.

111. The plaintiff was left without a remedy at law under New York law.

112. The Kaye Court defendants are liable to the plaintiff under Title 42, United States Code Sec. 1983 for the unlawful deprivation of plaintiff's civil rights.

ALLEGATIONS REGARDING INAPPLICABILITY OF IMMUNITY DEFENSES HERETO

113. The doctrine of judicial immunity is not an available defense for the acts committed by the defendants in the clear absence of all subject matter jurisdiction.

114. Judicial immunity is not an available defense where the plaintiff seeks mandatory/declaratory and/or injunctive relief.

115. The Clerk is not protected by immunity for it is alleged that he refused to perform the mandatory ministerial and nondiscretionary act of dismissing Equitable's appeal.

116. New York State is not a defendant herein. Plaintiff seeks no money damages from any defendant in their official capacity.

117. The official capacity claims are solely directed to plaintiff's prayer for mandatory declaratory/injunctive relief.

118. There are no Eleventh Amendment issues to be raised by the defendants as a defense hereto.

119. Plaintiff is not challenging or seeking review of the Court's decision itself. Rooker-Feldmen, res-judicata, and collateral estoppel are not available defenses to this action.

RELIEF REQUESTED

WHEREFORE, plaintiff demands relief and/or judgment as follows:

(a) For compensatory damages of $854,950.04 plus statutory interest from the date of the entry of plaintiff's judgment, against each defendant on an individual basis, jointly and severally.

(b) Alternatively for a declaratory mandatory judgment against the defendants in their official capacity stating that the Court's June 11, 1992 decision and order is void and thus a nullity, that said decision and order is to be vacated *ab initio*, and that the plaintiff's judgment against Equitable as affirmed by the Appellate Division in the amount of $854,950.04 plus statutory interest is to be reinstated retroactive to the date it was originally filed, and that the plaintiff have execution thereon.

(c) For punitive damages individually against each defendant named herein jointly and severally in such an amount as may be determined at trial to be just and proper;

(d) For costs and expenses herein, including reasonable attorney fees as provided for by 42 U.S.C. Sec. 1988.

(e) For such other and further relief as the Court may deem appropriate and just.

Dated: Freeport, New York
December 14, 1994

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